INDEX.

	PAGE
Objection to jurisdiction	1
Argument	5
Appendix "A"—Quotations from petitioners' brief in the United States Circuit Court of Appeals	13

CASES CITED.

Adams v. Dugan, 196 Okl. 156, 163 P. (2d) 227	2, 4, 8, 9-13
Dean v. Anson, 128 Okl. 23, 261 Pac. 174	6
Duignan v. United States, 274 U. S. 200	5
Guslin v. Marshall, 156 Okl. 173, 10 P. (2d) 250	6
Hunt v. Van Siclen, 136 Okl. 69, 276 Pac. 182	6
Lemmon Co. v. Oppenheimer, 155 Okl. 209, 8 P. (2d) 679	6
McLaughlin v. Yingling, 90 Okl. 159, 213 Pac. 552	4
Muskogee Electric Traction Co. v. Dunham, 129 Okl. 70, 263 Pac. 1091	6
Street's Estate, In re, 138 Okl. 115, 280 Pac. 413	4, 7
Walker's Estate, In re, 179 Okl. 442, 66 P. (2d) 88	4, 7

SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

No. 1308

Ralph Crews; Charley Crews; Robert Crews; Everett Crews; Amy Treaner, *nee* Crews; and Mary Willis, *nee* Crews, *Petitioners,*

vs.

D. J. Oven; and A. D. N. Champlin; Helen Champlin Oven and Joe Noble Champlin, as Executors under the Will of H. H. Champlin, Deceased; A. D. N. Champlin; Doyle W. Cotton; Helen Elizabeth Cotton; Doyle W. Cotton, Jr.; Doyle W. Cotton as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of Helen Elizabeth Cotton and Doyle W. Cotton, Jr.; Helen Champlin Oven; David Jerald Oven; Herbert Hiram Oven; Joan Oven; Helen Champlin Oven, as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of David Jerald Oven, Herbert Hiram Oven and Joan Oven; Joe Noble Champlin; Joanna Champlin, Herbert Hiram Champlin III; Douglas Lloyd Champlin; Joe Noble Champlin, as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of Joanna Champlin, Herbert Hiram Champlin III, Douglas Champlin and of the children, if any, hereafter born to Joe Noble Champlin and Jane Edwards Champlin, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI* AND OBJECTION TO JURISDICTION.

Come Now, The respondents in the above entitled cause, by Harry O. Glasser, Nathan Scarritt and E. S. Champlin, their counsel, and in conformity with the provisions of (3) of Rule 38, respectfully enter objection to the

jurisdiction of the Court to grant *certiorari* in this cause and in support of such objections file the following brief in opposition to said petition:

That petitioners have wholly failed to state, or to attempt to state a Federal question.

The petitioners, in an effort to establish jurisdiction in this Court, assert that the Circuit Court of Appeals for the Tenth Circuit has decided a question of local law in conflict with applicable local decisions. On the contrary, however, the record shows that both the trial court and the Circuit Court of Appeals fully recognized their duty to follow the local law and that in seeking to do so, they did in fact apply the Oklahoma contingent remainder rule as expressed in *Adams* v. *Dugan*, 196 Okl. 156, 163 P. (2d) 227, which both courts agreed is the controlling Oklahoma decision on the subject.

Under III, on page 6 of the petition, petitioners say:

"The questions presented by this petition are:

"(1) Whether the trust provisions of the will of H. H. Champlin, deceased, are in violation of the rule against perpetuities (therefore) the estate bequeathed and devised to Claire Marie Oven under such will was a vested estate in her.

"(2) * * * * * * *"

In stating the above as the sole ground for review, the petitioners have completely reversed the position which they asserted in the Circuit Court of Appeals.

In that court, the petitioners took the position that if the bequest to Claire Marie Oven was dependent upon the trust, the entire bequest to her would be void under the rule against perpetuities.

This position is plainly stated by the petitioners in their brief in the Circuit Court of Appeals at page 43 thereof, quoted *infra*.

In contrast, the petitioners now take the position that the trust provisions offend the "rule against perpetuities" so as to void such trust provisions impressed upon the bequest to Claire Marie Oven, but that such bequest (paragraph 5 of the will) now stands alone and is perfectly valid.

This change in position is the departure of which we complain.

It is, they say, under IV, page 6 of the petition, that there are "special and important reasons" for the allowance of the writ, which are not identified or otherwise noted other than as follows:

> "Because there is an important question of Oklahoma law,[1] which is determined by the Constitution of Oklahoma[2] and by the Statutes of Oklahoma[3] and which question[4] has been passed upon and determined by the decisions[5] of the Supreme Court of the State of Oklahoma * * * and the decision of the Circuit Court of Appeals is contrary to and in direct conflict with controlling decisions[6] by the Supreme Court of the State of Oklahoma deciding such question.[7]"

1. Whether as to perpetuities, which was not invoked in the Circuit Court of Appeals, or as to contingent remainders, upon which the case was tried, argued, submitted and decided, counsel do not say.
2. The provisions in mind are not identified.
3. Which are also unidentified.
4. The same uncertainty as to whether perpetuities or remainders are in counsel's mind.
5. Unidentified by citation or as to subject matter.
6. Unidentified by citation or as to subject matter.
7. What question? Certainly not the question as to whether the trust provisions of the will of H. H. Champlin with regard to the remote contingent bequests to great grandchildren in the event there be any such whose birth would occur under circumstances such as recited

The Circuit Court of Appeals concluded that the devise to Claire Marie Oven was dependent upon the trust; and therein lies the petitioners' difficulty which now prompts a direct attack upon the provisions of the trust itself.

Counsel's mere admonition as to the rule against perpetuities did not invoke the rule, and for the obvious reason that if the trust provisions which necessarily involve the distribution of the estate are void as offending the "rule against perpetuities," there would be no comfort in such situation for the petitioners, for certainly Claire Marie Oven, a granddaughter, is not an heir of H. H. Champlin under the laws of descent and distribution of the State of Oklahoma.

---

in paragraph 3, page 13, of the petition for *certiorari*, would offend the "rule against perpetuities," for if these remote contingent trusts to such great grandchildren so born be challenged as offending the "rule against perpetuities," the settled law of Oklahoma would require a court to do one of two things, neither of which would vest title in Claire Marie Oven. The court would be compelled to hold either that, (1) these remote trusts constituted a necessary and integral part of the entire scheme of distribution and that the entire will was therefore void; or, (2) declare the remote contingent trusts as to the great grandchildren so born, void and preserve the remainder of the will.

See, McLaughlin v. Yingling, 90 Okl. 159, 213 Pac. 552;
In re Street's Estate, 138 Okl. 115, 280 Pac. 413;
In re Walker's Estate, 179 Okl. 442, 66 P. (2d) 88.

The latter would doubtless be the decision of an Oklahoma court, as such result is favored by the law of Oklahoma. It is apparent also that if such action should be taken, the trusteeships as to the grandchildren, including Claire Marie Oven, would be preserved, in which event the bequests to Claire Marie Oven, upon the authority of Adams v. Dugan, 196 Okl. 156, 163 P. (2d) 227, would still be contingent and her father, D. J. Oven, would inherit no part thereof, as was held by the Circuit Court of Appeals in the present action.

Upon the second contingency just stated, there can be no point in petitioners' favor, for if the trust provisions as to the contingency of unborn great grandchildren as recited in paragraph 3, page 13, of the petition for the writ, be void as offending the "rule against perpetuities," the issues in this case would in no wise be thereby affected. Claire Marie Oven did not leave any lineal issue. The rule in Adams v. Dugan, supra, would control and the decision here complained of would be sustained.

No stronger support for the correctness of this conclusion upon our part can be found than the admission at the top of page 43 of petitioners' brief in the United States Circuit Court of Appeals, wherein it was said:

> "* * * if the provisions of the will are such that the devise to Claire Marie *is dependent* on the trust then the devise *is void.* Claire Marie would not take as a contingent remainderman; she would not take at all."

Notwithstanding the foregoing admission and its implications, petitioners nevertheless confine their argument in the petition for the writ, to,

Point 1. The rule against perpetuities,

and,

Point 2. The writ of *certiorari* should be granted,

and our argument in opposition to the granting of the writ will therefore be likewise confined to these propositions.

ARGUMENT.

The interpretation of the "rule against perpetuities" is one of application of local law. However, the Circuit Court of Appeals did not pass upon that question—it was not urged—and for such failure upon petitioners' part to urge and for the court resultingly to fail to act thereon, that question and related matters are not before this Court.

See: *Duignan* v. *United States,* 274 U. S., p. 200, and cases there cited.

A litigant may not in Oklahoma prosecute his case or defense in the trial court upon one theory and lose, and

upon appeal be permitted to present another theory upon which to rely and prevail.

See: *Hunt* v. *Van Siclen*, 136 Okl. 69, 276 Pac. 182;
Muskogee Elec. Traction Co. v. *Dunham*, 129 Okl. 70, 263 Pac. 1091;
Dean v. *Anson*, 128 Okl. 23, 261 Pac. 174;
Lemmon Co. v. *Oppenheimer*, 155 Okl. 209, 8 P. (2d) 679;
Guslin v. *Marshall*, 156 Okl. 173, 10 P. (2d) 250.

The contention now urged by petitioners, as to the trust provisions of the will being void as offending the "rule against perpetuities" was not invoked, as we have heretofore said, in the Circuit Court of Appeals, nor presented to the trial court. All that was said in the petitioners' brief in the Circuit Court of Appeals is found at pages 41-43, incl., of their brief and is printed as Appendix "A" to this brief.

The substantial effect of the whole of such arguments is merely to continue to say,

(1) "that the devise to Claire Marie Oven was not dependent upon the trust,"

while contending that,

(2) "if the devise unto Claire Marie is dependent upon the trust"

such devise

"is void."

Petitioners are in error in both directions.

The trust provisions as to the bequest to Claire Marie, who died without lineal issue, are not void, and the devise is dependent upon the trust.

As against what the Circuit Court of Appeals found, in effect to be the clear intention of the testator, the petitioners now argue that all trust provisions of the will are invalid, leaving a naked unqualified bequest to each grandchild named in the will, of an interest in said estate.

Such construction would entail the immediate delivery of such bequests to each of such grandchildren.

The testator well understood that it would be most unwise to vest children of youthful age with substantial sums of money, or its equivalent, hence the trust provisions which are and were intended to be impressed upon the gifts.

The possibility that Claire Marie, if she had lived sixteen additional years, might have died in then giving birth to a lineal descendant and that the enjoyment of such bequest to such lineal decsendant child might trespass upon the "rule against perpetuities" would certainly be without bearing or importance upon the provisions of the trust impressed upon the bequest to Claire Marie Oven.

The most that can be argued under the law of interpretation in Oklahoma, which requires the approval of as much of the will as does not offend the rule against perpetuities (*In re Street's Estate,* 138 Okl. 115, 280 Pac. 413; *In re Walker's Estate,* 179 Okl. 442, 66 P. (2d) 88), would be that the provisions of the trust with relation to the devise over to *great grandchildren,* would be void.

Short of that, as the condition exists here, the will otherwise must have the approval of any court which surveys the question. Its preservation in every other respect is imperative and mandatory.

From these premises there is no escape and we are brought back sharply to the "sole question" in the case as stated by Judge PHILLIPS (p. 781, 159 F. (2d)), *viz:*

> "The sole issue presented is whether the bequest to Claire Marie was vested or contingent."

The application of the decision of the Oklahoma Supreme Court in *Adams* v. *Dugan, supra,* by the trial and Circuit Court of Appeals, as determining that question, is not now open to question.

Counsel having failed to secure in the Circuit Court of Appeals a favorable interpretation of the opinion of the Supreme Court of Oklahoma in *Adams* v. *Dugan,* 196 Okl. 156, 163 P. (2d) 227, *supra,* upon the contention that the,

> "devise to Claire Marie (Oven) is an absolute gift subject to be defeated by an executory gift over and that the absolute gift can be defeated only by the happening of the specified contingency * * *,"

become more than critical at pp. 15 and 16 in thier petition, and say,

> "* * * With no purpose of being facetious, and with the single purpose that we may arrest the attention of this court and cause it to examine that case—we do say, that the principles presented, considered and decided by the Supreme Court of Oklahoma in *Adams* v. *Dugan, supra,* have no more similarity to the principles presented and decided in the present case, than an opinion by the Supreme Court of Oklahoma involving the simple questions arising in an ordinary action for the replevin of a sow and pigs."

Four learned judges have unanimously agreed that the *Adams* v. *Dugan* case, *supra,* controls the determination of the question.

The lone dissenting opinion of Justice Hurst in the *Adams* v. *Dugan* case (p. 159) makes a better argument for petitioners' position than counsel for petitioners make.

We quote the material portions thereof as follows:

"The judgment is reversed, and the cause remanded, with directions to overrule defendant's demurrer to plaintiff's petition, and to proceed consistently with the views herein expressed.

"GIBSON, C. J., and OSBORN, BAYLESS, DAVISON, and ARNOLD, JJ., concur, HURST, V. C. J., dissents.

"HURST, V. C. J., (dissenting). The majority opinion is based upon the assumption that the interest of George Steedman in the lands levied upon is at most a contingent remaidner. I think it is a vested remainder.

"1. Our statutes do not define vested and contingent remainder, though they refer to them. 60 O. S. 1941, ch. 2. We must look, then, to the general law for the distinctions.

"In Black's Law Dictionary (3d. Ed.) a vested remainder is defined as one 'limited to a certain person at a certain time or upon the happening of a necessary event,' and a contingent remainder is defined as one 'limited to take effect to a dubious and uncertain person, or upon a dubious and uncertain event.' Similar definitions may be found in many cases and text books. See, 23 R. C. L. 497, 499; 33 Am. Jur. 525, 529; 21 C. J. 980, 981; 31 C. J. S. 88, 90. A vested remainder is an estate, while a contingent remainder is not an estate but is a mere possibility or prospect of an estate. Simes, Law of Future Interests in Land, Sec. 68; Tiffany, Real Property, (3d Ed.), Sec. 325; 23 R. C. L. 500; 33 Am. Jur. 527, 530; 21 C. J. 979, 984; 31 C. J. S. 88, 91.

"There are three classes of vested remainders, (a) those absolutely vested, (b) those subject to being partly divested by opening and letting in other remaindermen, and (c) those subject to being completely divested. Simes, Sec. 57; Restatement, Property, Sec. 157; Tiffany, Sec. 319.

"The remainder here is either a contingent re-

mainder or a vested remainder of the third class—one subject to complete defeasance. The difference between the two, broadly speaking, is stated in an annotation on the subject in 131 A. L. R. 712, as follows: 'If the condition on which the estate depends is precedent, the estate is contingent; if subsequent, it is vested, subject to defeasance.' To the same effect, see 23 R. C. L. 509, Sec. 43; 33 Am. Jur. 544, Sec. 88; Page on Wills, (2d. Ed.) Sec. 1116.

"In case of doubt the courts will, where possible, construe a remainder to be vested rather than contingent, and they favor a construction that will make the remainder vest at the earliest possible date. 21 C. J. 995; 31 C. J. S. 96; 23 R. C. L. 521; 33 Am. Jur. 558; Simes, Sec. 93; Gray, The Rule against Perpetuities (4th Ed.), Sec. 752.

"The interest of George Steedman in the lands fits the definition of a vested remainder and not that of a contingent remainder as stated by Black, above. The three remaindermen, children of testator, are 'certain persons.' The event which entitles them to come into possession of the estate is a 'necessary event.' Their mother is certain to die, and eleven years are certain to elapse after her death. It would seem, then, that the remainder interest should be considered vested unless the other provisions of the will clearly indicate that the testator intended it to be contingent. The fact that the remaindermen are expressly given the right to dispose of their interest, either by grant or will, so that the grantee or beneficiary under the remainderman's will would have an absolutely vested interest, thus rendering the other conditions inapplicable, is indicative of an intention on the part of the testator that interest of the three children shall be vested rather than contingent. I do not believe that any of the provisions establish an intention on the part of testator that the remainder interests be contingent.

"*a.* The will gives the trustee power to sell the property and to reinvest the proceeds and to hold the same subject to the terms of the trust. But, the rule seems to be universal that a remainder is not rendered contingent by a power given the life tenant, executor or trustee to dispose of the property either by grant or by will. Simes, Sec. 80; Tiffany, Sec. 319; Restatement, Property, Sec. 157, and comemnts under clause (c); 131 A. L. R. 712, at 715, annotation; 21 C. J. 981; 69 C. J. 625, Sec. 1717; 31 C. J. S. 90; 23 R. C. L. 511; 33 Am. Jur. 545.

"*b.* The intention of the testator that there shall not be a present vesting of the remainder in the three named children of testator is not shown by the fact that the will merely directs the trustee to 'pay over and deliver' the property to the children at the termination of the particular estate in the trustee, under the 'divide and pay over' rule, especially when other provisions, such as those giving the three children the right to dispose of their interests, are taken into consideration. *Koelliker* v. *Denkinger,* 148 Kan. 503, 83 P. (2d) 703, 119 A. L. R. 1; Restatement, Property, Sec. 260; 33 Am. Jur. 571; 69 C. J. 628, Sec. 1721. The courts favor holding an estate vested under the 'divide and pay over' rule where the remainder is given to named persons who are the natural objects of the bounty of testator, such as his children. 128 A. L. R. 309, annotation. And where the postponement of distribution is for the convenience of the estate so as to let in some other interest, or, as here, to pay an annuity to the life tenant, and not because of the incapacity of the remainderman, as in case of a spendthrift trust, it is said that the immediate vesting in the remaindermen is not prevented by the postponement under the 'divide and pay over' rule. 33 Am. Jur. 570; 69 C. J. 630.

"*c.* The present vesting in the three named children of testator is not prevented by the fact that, in the fifth paragraph of the will, it is provided that the in-

terest of any of the named remainderman, who may be deceased at the time the particular trust estate shall cease, shall go to his or her living issue, provided such remainderman shall not have sold or willed away his or her remainder interest, nor by the fact that if such remainderman shall die intestate, without issue and without having disposed of his or her remainder interest, and none of testator's children are then living, the share of such deceased remainderman shall go to the *then* heirs at law of the testator. These are conditions subsequent. 69 C. J. 632-637; Annotations, 109 A. L. R. 5 and 136, and 128 A. L. R. 306. However, the interest of the *issue* of the remainderman or the *then* heirs of the testator would probably be contingent.

"The direction to pay over and deliver the interests at the expiration of eleven years after the death of the widow to testator's 'then living children' refers to the possession and enjoyment of the property and does not mean that until that time the remainder interests of the three named children are contingent. This is another way of saying that if a remainderman has died prior to the time when the precedent trust estate shall cease, the interest of the deceased remainderman shall go in the manner directed in the will.

"*d.* The present vesting of the remainder interest is not prevented by the fact that the particular limited estate is vested in a trustee. The remainder interest does not vest in the trustee at all. See 23 R. C. L. 508, 529; 33 Am. Jur. 564; 65 C. J. 541. As to such remainder interest, the trustee simply holds a power in trust. 60 O. S. 1941, Secs. 190, 191; Simes, Sec. 252; 41 Am. Jur. 808.

"While authorities may be found to support any position that may be taken on some of the questions above mentioned, I think the view supported by the better and more recent authorities is that the interest of the three named children of testator is a vested remain-

der subject to complete defeasance by the happenings of conditions subsequent, such as sale of the property by the executor to pay the debts of testator, or sale by the trustee under the power given in the will, or death of a remainderman intestate and without issue and without having conveyed his interest. A careful study of the cases cited in the majority opinion convinces me that they do not support the conclusion reached.

"• • • • • • • •

It is obvious that the Oklahoma Supreme Court has adopted the rule upon the question of future estates, which was applied by the Circuit Court of Appeals in this case. Whatever difference in opinion may exist as to the propriety of the rule so adopted, does not present a question for consideration. The rule adopted in Oklahoma was correctly applied in this case by the Circuit Court of Appeals.

Wherefore, respondents respectfully pray that the petition for *certiorari* be denied.

HARRY O. GLASSER,
NATHAN SCARRITT,
E. S. CHAMPLIN,
Counsel for Respondents.

APPENDIX "A"

Quotations from petitioners' brief in the United States Circuit Court of Appeals, pp. 41-43, incl.:

"• • • • • • • •

"If it should be supposed that the trial court concluded that the devise to Claire Marie is dependent on the trust, then therein lies the error in the reasoning of the trial court. Because, if the devise unto Claire Marie is dependent on the trust, then it is certain that

a violation of the *rule against perpetuities* may possibly happen, and that, therefore, the devise of interests dependent on such provisions is void. In Oklahoma, the *rule against perpetuities* is found in the sections of the 1941 Okla. Stats. Ann., set out in the foot-note below.

"These sections were Sections 8410, 8413 and 8466, respectively, Comp. Stats. 1921, and were construed by the Supreme Court of Oklahoma in *McLaughlin* v. *Yingling*, 90 Okl. 159, 213 Pac. 552, and *In re Street's Estate*, 138 Okl. 115, 280 Pac. 413.

"In *Easton* v. *Hall*, 323 Ill. 397, 154 N. E. 216, is a full discussion of the rule against perpetuities. At page 408 of 327 Illinois, at page 219 of 154 N. E., the opinion says:

> 'The rule against perpetuities is: "That no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray's Rule Against Perpetuities, Sec. 201. If the provisions of a will are such that under them a violation of

---

"Title 60, Sec. 31: 'The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except as provided in Section 6608.'

"Title 60, Sec. 34: 'A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.'

"Title 60, Sec. 172: 'No such express trust shall be valid unless created, first, by a written instrument subscribed by the grantor or grantors duly acknowledged, as conveyances of real estate are acknowledged, and recorded in the office of the county clerk of each county wherein is situated any real estate conveyed to such trustee, as well as in the county where the principal property is located or business conducted; or, second, by a will duly executed, as required by the law of the state. Such express trusts shall be limited in the duration thereof either to a definite period of not to exceed twenty-one (21) years, or to the period of the life or lives of the beneficiary or beneficiaries thereof. The instrument creating the trust shall specify the period of duration thereof within the limitations herein provided'."

the rule against perpetuities may possibly happen, then the devise of interests dependent upon such provisions is void. The time fixed by this will for the distribution of the funds of the trust and its payment to the ultimate takers of the property of the estate was at the death of the last survivor of the beneficiaries of the trust for whom annuities were provided. If that time may possibly be more than 21 years after the death of the testatrix, it is too remote for the gift over to be valid. * * * The improbability of its occurrence after the prescribed time is immaterial. If it can possibly happen after that time, an interest conditioned upon it is too remote. Gray's Rule Against Perpetuities, Sec. 214; Tiffany on Real Prop., Sec. 180.'

"In Oklahoma, the rule is stated in *In re Walker's Estate,* 179 Okl. 442, 66 P. (2d) 88, 95, as follows:

'Stated broadly, the rule against perpetuities is that executory limitations are void unless they take effect, of necessity, and in all possible contingencies, within the period of a life or lives in being at the death of the testator, and twenty-one years thereafter. An estate to vest in the future, which may possibly not vest until after the expiration of a life or lives in being, plus twenty-one years, could not validly exist, and an instrument attempting such purpose would be invalid, for it would be in violation of the rule. Sections 11759, 11756, O. S. 1931 (60 Okla. Stat. Ann., Sec. 34, 31). *Phillips* v. *Chambers,* 174 Okl. 407, 51 P. (2d) 303.'

"The provision of the will here, as to duration of the trust, is quoted at page 39, above. Suppose, for example, that, after death of testator, a child has been born to and survived Claire Marie, and that such child was, say one month of age at the death of Claire Marie. By the terms of the will, the trust, in such circumstances, would continue until such child arrived at the age of

35 years. Obviously, that is for a period of the life of a person in being and for 34 years and 11 months thereafter; hence, if the provisions of the will are such that the devise to Claire Marie is dependent on the trust then the devise is void. Claire Marie would not take as a contingent remainderman; she would not take at all.

"But we do not think it can successfully be argued that the devise to Claire Marie is dependent on the trust. By the fifth section of the will there is a devise 'in kind' of six and sixty-six hundredths plus interest to Claire Marie. Then, by subsequent provisions of the will, such interest is impressed with a trust—the vesting of the estate was not delayed, but merely its possession and enjoyment. We think it clear that the interest vested in Claire Marie in the first instance and that such vesting was not dependent on the trust.

"The rule against perpetuities is directed to the vesting of the interest and not to its possession and enjoyment. *McClary* v. *McClary,* (C. C. A. 10) 134 F. (2d) 455. If, as we believe, the devise to Claire Marie was not dependent on the trust, then it was not violative of the rule against perpetuities.

"• • • • • • • •"

In the petition for rehearing filed in the Circuit Court of Appeals, the following statement (p. 16) as to the "rule against perpetuities" was all that was said upon the subject, *viz.*:

"• • • • • • • •

"Additionally, it must be remembered that in Oklahoma the rule against perpetuities is that 'an estate to vest in the future, which may *possibly* not vest until after the expiration of a life or lives in being, plus twenty-one years, could not validly exist, and an instrument attempting such purpose would be invalid for it would be in violation of the rule.' *In re Walker's Estate,* 66 P. (2d) 88, 95. Looking now to the provisions of sub-

division sixth of the Champlin will, whereby the trust was to continue until Claire Marie reached the age of 35 years and in the event she died before reaching that age 'leaving lineal descendants, then I further direct that these trusteeships continue until such lineal descendants arrive at the age of thirty-five (35) years.' Suppose, now, by way of illustration, that Claire Marie had died in child-birth and left surviving a lineal descendant born at the time of her death. By the terms of the will the trust, in such circumstances, would continue until such child arrived at the age of thirty-five years. Obviously, that shows an attempt to create a trust which may *possibly* continue for the life of a person in being and for thirty-five years thereafter. If then, *as has now been held in this case,* the provisions creating the trust are such as to prevent vesting of the estate in the devisees until the termination of that trust, then indubitably, subdivision sixth was and is void as being in violation of the rule against perpetuities. Eliminate the sixth subdivision, as it must be eliminated under the above reasoning—reasoning which is founded on the holding of the court herein—and there is left the fifth subdivision which clearly and distinctly makes an absolute devise to Claire Marie, and the seventh subdivision the meaning of which this court deemed to be so obscure and uncertain as to be made evidence only by the consideration of the oral declarations of the testator as to his meaning. Eliminate such oral declarations of the testator—as we have shown they must be eliminated—and there is left the seventh subdivision with its unascertained obscure and uncertain meaning, and, by the specific admonition of Section 156, *supra,* the clear and distinct absolute devise made in subdivision fifth cannot be affected by the uncertain provisions of the seventh subdivision."